Supreme Court of the United States.

December Term, 1868.

No. 259.

Dover Five-Cent Savings Bank,
Edwin D. Morgan and others,
AND
Boatmen's Savings Institution,
} Appellants,

AGAINST

The UNITED STATES.

BRIEF OF THE PETITIONERS.

STATEMENT.

These cases were heard and determined in the Court of Claims, upon the evidence, so far as applicable, which had been taken in the case of Peirce against the United States, (No. 23, December Term, 1868,) which is now pending in this Court, subject to the exceptions as to its competency, which were taken in that suit. In these cases the Court of Claims have found —

No. 2.—"That it is and has been the practice of heads of departments to accept drafts or bills of exchange for the transmission of funds to disbursing officers, or the payment of those serving in distant stations, or for services rendered." *See Record, p.* 19.

No. 9.—"That on the 18th day of May, 1861, and when the said drafts or bills of exchange were drawn and accepted there were due to Russell, Majors & Waddell, on their contracts for transportation, the sum of $17,488.84, and no more."

No. 10.—"That the said drafts or bills of exchange were accepted by the said Floyd, for the benefit and accommodation of said Russell, Majors & Waddell, and on an agreement between them and the said Floyd that the same should be taken up and paid by the said Russell, Majors & Waddell, so that they should not be presented for payment at the Treasury of the United States." *See Record, p* 21.

The Court do not find that the petitioners had any knowledge of the agreement between the drawers of the bills and the Secretary, except so far as is shown on the bills which the petitioners purchased, in open market, before their maturity. In other respects, the finding of the Court below corresponds with the case of Peirce, as to matters of fact, and they conclude, as matter of law, that the cases are substantially, in legal effect, the same as the the case of Peirce.

I. The petitioners rely upon the brief which has been filed in the case of Peirce, and upon the positions, principles and authorities therein.

II. The Executive is one of three co-ordinate and equal branches which constitute the government; is charged with certain trusts and duties; is invested with authority adequate to an accomplishment of the purpose for which it was made an integral part of the sovereignty of the country.

A. The principal officers of the several executive departments are not, as the defendants insist, mere agents, invested with the least possible authority known to the law of agency as applied to private agents. These officers are, quasi, principals. They, in part, administer the government, under the direction of the President; their acts, prima facie, are legal, and are to be upheld by every reasonable intendment; and in all cases, in which they are allowed to exercise a discretion, their acts are conclusive. The government cannot perform its trusts upon any other theory. In matters of government, and in great questions of policy, it is not safe to argue or decide from the nature of private agreements.

Grindley vs. *Barker*. 1 *Bos. and Bel.*, 236, *ch. Jus. Eyre*. "It is well established that when a number of persons are entrusted with powers, not of mere private confidence, but in some respects of a general nature, and all of them are regularly assembled, the majority will conclude the minority, and their act will be the act of the whole. If power of a *public nature* be committed to several who all meet for the purpose of executing it, the act of the majority will bind the minority.

The King vs. *Whitaker*, 9 *B. and C.*, 648, 651. *Lord Tenterden* "as well on the authority of Grindley against Barker, as on the general principle, that this being a matter of *public duty and public trust*, (not of private authority) we think the apportionment by two of the three commissioners was good."

Wilkinson vs. *Mulin*, 2 *Cromp. and Jer.*, 636. A trust to do (so and so) is of a public nature, and therefore an act by a majority of the trustees assembled for that purpose is valid.

Blacket vs. *Blizard*, 9, *B. and C.*, 851, 857, *Bayley Jus.* "I take it to be a general rule of law, that where a *public trust* is to be executed by a definite number of persons, it must be executed at a meeting where a majority of that number is present, unless there be an usage or custom to the contrary. It is different from a trust or power of a private nature, for that must be executed by all the persons to whom it is given." Littledale and Parke concurred.

Williams vs. *School District, etc.*, 21 *Pick*, 76–82.

Despatch Line Packets vs. *Bellamy Man'f Co.*, 12 *N. H.*, 226.

Parker vs. *Conway*, 2 *Foster, New Hamp.*, 148.

Rogers vs. *Byrlington*, 3 Wallace, 654. Power "to borrow money for *any* public purpose," gives authority to a municipal corporation to borrow money to aid a railroad company, making its road as a way for public travel and transportation; and, as a means of borrowing money to accomplish this object, such municipal corporation may issue its bonds, to be sold by the railway company, to raise the money.

B. These cases establish the position, that the acts of public officers, in the execution of public trusts, are not restrained within the limits

applicable to a special authority of a private nature. The principle applies to the executive, and the principal officers of its several departments, more distinctly, than it can be applied to public officers of a lower grade.

The citation from "Story on agency, sec. 307, A," based upon the case of "Lee vs. Munroe, 2, Cranch 366," does not and cannot control the principles upon which the petitioners rely. It is evident that neither the author, or the Court, were discussing, or had in mind, the principles by which the executive branch of the government must be controlled, in the execution of the great trusts and duties confided to it. The learned author in the section cited, refers to *public agents*, and that their authority may be ascertained from their having been held out as having authority to act.

III. The Court of Claims, in the case of Peirce, placed their decision mainly upon the ground that the instruments declared upon were not valid bills of exchange, and therefore the respondents might avail themselves, in defence, of certain supposed equities subsisting against Russell, Majors & Waddell.

This construction of the paper, it is submitted, is clearly erroneous; and the circumstances found by the Court do not, in relation to either of the petitioners who were before the Court of Claims, lay the foundation for an equity which can control the legal rights of the holders of the bills.

Peirce vs. *United States*, 1 *Nott & Huntington*, 277. "The main question is, whether these instruments sued upon are valid bills of exchange of the United States. If they are all the incidents appertaining to commercial paper, attach to and inhere in them, and in the hands of a holder for value, which the claimant is admitted to be, no facts alleged or proved in this case can avail the defendants."—"on the other hand," &c.

IV. The cases relied upon by the defendants, as an examination will show, do not control the principles upon which the petitioners rest their rights to a judgment for the sums severally due to them.

Gidley vs. *Lord Palmerston*, 3 *B. & B.*, 275. "Assumpsit does not lie against the Secretary at War by a retired Clerk of the War Office for his allowance." The Secretary "was only the agent or officer of the Crown, and responsible to the Crown for the due execution of the trust or duty committed to him"—"an action will not lie against a public agent for any thing done by him in his public character."

This adjudication has no tendency to show that the Secretary at War has no authority to contract for supplies and transportation for the use of the army, when employed upon the service for which it was established. It is conceded, that a secretary who contracts, is not personally bound upon his official contracts, unless he intends to bind himself personally, and uses explicit language to that effect. (See *Parks* vs. *Ross*, 11 *How.* 374; *Hodgson* vs. *Dexter*, 1 *Cranch*, 345.)

Reeside vs. *Knox*, 2 *Wharton*, 233. The bill declared upon in this case, was identical with those set up in the case cited from the 15th of Peters, United States vs. The Bank of the Metropolis, and so far as it is relied upon by the solicitor, as an authority, it is controlled by the decision of the Supreme Court. It admits, however, that the United States may use, and become a party to bills of exchange; and that a direction to charge to drawer's account does not change the character of the instrument.

Strader vs. *Batchelor*, 8 *B. Munroe*, 162. In this case the Court say that the instrument before it was not negotiable, because not payable at all events, but on the sufficiency of a fund designated, which was uncertain and contingent. The case of Carlos vs. Fancort, 5 D. & E., 482, and the case of Jenney vs. Herle, 2 Lord Raymond, 1361, are of the same character and import.

In these cases the drawees were requested to pay *out* of certain designated moneys in their hands.

United States vs. *the Bank of the United States*, 2 *How.*, 711, 730, (*Appendix, opinion of Chief-Justice*, 745, 762,) 5 *How.*, 382. 400. This case, it is submitted, proceeds upon principles and reasoning peculiar to itself, and has no bearing upon, or application to the law upon which the petitioners rest their claims. France, by treaty convention with the United States, agreed to pay certain sums of money by instalments. Congress passed an Act July 13th, 1832, (4 Stat. at

Large, 574,) by which it was made the duty of the Secretary of the Treasury to cause the several instalments with interest thereon to be received from the French Government, and transferred to the United States, in such manner as he might deem best. A bill was drawn by the Secretary of the Treasury, upon the Minister and Secretary of State for the Department of Finance, Paris. Upon the back of the bill was a memorandum stating an account current between the two Governments. It was accompanied by a power of attorney from the President of the United States, authorizing the payee of the bill to receive the amount of the bill, and to give a full receipt to the Government of France. This mode was adopted to obtain the money, upon the suggestion and advice of the President of the bank which was the fiscal agent of the United States. The bill when drawn was delivered to the bank, and was made payable to its cashier, and the amount, less exchange, &c., was placed to the credit of the Government. The bill was endorsed by Jaudon, Cashier to the Barings, and by them to Rothschild. The bill was also accompanied by a letter from the Secretary of State to the French Government, giving advice of the draft. The bill was not accepted, but was taken up for the honor of the bank, *supra protest*, by its correspondent. The bank, upon return of the bill, charged the amount, including interest, costs and exchange, &c., and in addition, fifteen per cent. damages; the right to which fiteen per cent. was the only matter in dispute between the bank and the Government. When the case was before the Court, in the first instance, (2 Howard,) the members were divided in opinion. It was held that the bill was not liable to objection as being drawn upon a particular fund; that the United States, as drawers, were responsible to the bank for the damages claimed. The Chief-Justice, having given an opinion as Attorney-General, did not sit in the cause. His opinion is found in the appendix of the same volume. The Chief-Justice did not regard the bank as the purchaser of the bill, but as the fiscal agent of the Government for its collection. If it had been a purchase of the bill, the Statute of Maryland did not extend to bills drawn by the United States. If the statute was applicable to bills drawn by the Government, it was not responsible for the damages, because the bill by reason of the memorandum and the accompanying documents, was drawn upon a particular fund, and not, therefore, a bill of exchange, in the legal sense of the term, and consequently not within the statute. The Chief-Justice does not in his opinion say, or intimate, that the United States cannot become a party to bills of exchange, using the

terms in the legal sense in which they are applied to negotiable instruments. On the other hand, he concedes that the Secretary of the Treasury, so far as the United States were concerned, was authorized to use a bill of exchange, under the act which authorized him to procure a transfer of the money, *in such manner as he might deem best.* (See 2 How., 753.)

When this case was before the Court a second time, (5 How., 382,) the Court, (two of the Judges dissenting, the Chief-Justice and one other not sitting,) held that the structure of the bill was an open question, notwithstanding the prior decision. That the Statute of Maryland did not embrace a bill of exchange drawn on a foreign government. That a bill of exchange in form, drawn by one government on another, cannot be governed by the law merchant.

An examination of the case, and of the opinion of the Chief-Justice, will show that the judgment proceeded upon the fact that nations do not execute their obligations, by treaty, to pay money, by means of bills of exchange, drawn by the one upon the other; that their intercourse is conducted by their respective secretaries for foreign affairs, and not through their several treasury branches. The principles of the case so far as they can be applied to the case of the petitioner, are in harmony with those upon which his claim is presented.

V. PROPOSITIONS SUBMITTED.

1. The United States, as a Sovereignty, may become party to a bill of exchange.

2. Whensoever they become party to a bill of exchange, it must be through and by the executive branch of the Government, and not through the legislative or judicial branches.

3. The executive branch of the Government may use, or authorize the use of bills of exchange, whenever the trusts and duties imposed upon it by the Constitution, or by law, require such use, or when such trusts and duties can be more advantageously performed by their use, than by any other mode. Its authority in all cases is equal to the trusts or estate conferred.

4. The fact that an authority may be abused, or misused, (of which there is no proof in this case,) is not an argument against its existence.

5. If bills of exchange can be used by the executive branch of the Government, in any case, the petitioners are entitled to recover upon the bills set forth in their petition, unless fraud in their issue has been shown and brought home to the knowledge and privity of the petitioners, of which the record furnishes no proof.

6. If the executive can use bills, under any contingency, its judgment as to the existence of the contingency is conclusive and cannot be controlled by any other branch of the Government.

7. If the principles upon which, it is submitted, the Secretary of War, in the execution of the trusts confided to the department, may make such stipulations in contracts for supplies and transportation, as, in his judgment, the exigencies of the Government may require, cannot be sustained, the Government cannot perform the trusts and duties confided. This is especially true in relation to stipulations which ordinarily enter into the contracts of individuals of a similar character. If these principles cannot be sustained, many acts of the Government, especially of the executive branch, which have been required to maintain the public authority, to suppress resistence to the laws, cannot be upheld.

The amount of money which is due to the petitioners, and to other suitors, upon contracts of the War Department, is of importance to them.

In presenting these claims, counsel insist upon the right, legal and equitable, so well as upon the justice thereof. Without impropriety, they may well say, the principles upon which the right of the petitioners depends, are no less important to the country, its institutions, and to the Government, than they are or can be to them.

The case is respectfully, and confidently, submitted to the judgment of the Court.

C. B. GOODRICH.